PUBLIC PROSECUTOR v. KULASINGAM

[R.Cr.J. (Hashim Yeop A. Sani J.) March 25, 1974]
[Seremban — Criminal Revision No. 2 of 1974]

Criminal Law and Procedure — Trial — Magistrate transferred to be Deputy Public Prosecutor — Case part heard — Whether case should be continued or be tried de novo — Criminal Procedure Code (Cap. 6), ss. 261, 316 and 325.

In this case the learned magistrate who originally tried the case had been transferred to be a Deputy Public Prosecutor. He had heard the prosecution case and called on the defence and a defence witness had given evidence. Subsequently, the magistrate before whom the case was brought made an order for the case to be tried *de novo*. When the case came up before the magistrate the Deputy Public Prosecutor suggested that the case be continued under section 261 of the Criminal Procedure Code. Defence counsel objected and subsequently applied for an order of prohibition against the learned magistrate. The matter came before the High Court in revision.

Held: in view of the large number of witnesses already heard and the large number of exhibits already tendered, a rehearing would cause unnecessary hardship and unreasonable expenditure in this case and therefore the court would order that the case be continued under the provisions of section 261 of the Criminal Procedure Code.

CRIMINAL REVISION.

Hashim Yeop A. Sani J.: I have called for the charge sheets and records in Sessions Court, Seremban, Arrest Case No. 4 of 1971 because in the Notice of Motion No. 15 of 1974 the statement of application for leave to apply for an order of prohibition directed to Encik Abdul Murad bin Sheikh Ismail (to prohibit him from further proceeding in that case) refers to a certain order of "*trial de novo*" made by Encik Wan Abdul Aziz bin Wan Daud on 29th January, 1974 in that case.

From what can be gathered from the records the following seem to be the position todate. One R. Kulasingam was charged in the Sessions Court, Seremban under section 409 of the Penal Code and the prosecution case commenced on 15th June, 1971. After a protracted hearing of 27 prosecution witnesses who produced 98 exhibits the defence was called on 20th September, 1972. On 26th January, 1973 the three alternatives were explained to the accused. On the same date the first defence witness was called to give evidence. From then on no progress was made on this case except that the records show that on a number of sittings of the court postponements were granted firstly on 19th April, 1973, where Encik Abdul Murad indicated that he had received instructions not to proceed in the case as he had been appointed a Deputy Public Prosecutor and secondly on 21st September, 1973, where the succeeding President, Encik Mohamed Noor bin Haji Abdullah, ordered a trial *de novo*. On 29th January, 1974 the case was mentioned again before Encik Wan Abdul Aziz bin Wan Daud at which proceeding the Deputy Public Prosecutor suggested that the case be continued under section 261 of the Criminal Procedure Code. Also recorded is the objection of the defence counsel who requested that the case be heard *de novo* on the basis of the previous order of the President. Again on 4th March, 1974 the case was put before the original President, Encik Abdul Murad bin Sheikh Ismail, and at that proceeding the defence counsel submitted that since an order of trial *de novo* had already been made the case could not be continued under section 261 of the Criminal Procedure Code. It is also recorded that at that proceeding the defence counsel asked for an adjournment to study the papers for the purpose of getting a proper ruling from the High Court on this matter. Finally on 5th March, 1974 defence counsel informed Encik Abdul Murad bin Sheikh Ismail, that he was filing an application for an order of prohibition prohibiting him from further proceeding in the matter. This has now resulted in Notice of Motion No. 15 of 1974. The case was therefore further adjourned.

The problem involved in this case is not infrequently encountered in the administration of justice in the lower courts of this country. The reason is simple and that is the Judicial and Legal Service of the Federation is divided into two main departments, namely, the Judicial Department and the Legal Department. Officers serving in the Judicial Department are appointed and gazetted as Presidents of Sessions Courts and Magistrates and officers serving in the Legal Department are appointed and gazetted as Federal Counsel or Deputy Public Prosecutors. Because all these officers belong to the same parent service they are transferable from one Department to the other more often than not with short notice thereby requiring them to exercise entirely different functions in the administration of the law. My view has always been that it would be perfectly proper for a President or Magistrate who has since been transferred to the Legal Department to assume functions as Federal Counsel or Deputy Public Prosecutor to complete any part-heard cases originally heard by him in the court where he was previously stationed. But of course this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice as for example in a case where the officer concerned was previously a President or Magistrate in the same State but has now been appointed to be a Deputy Public Prosecutor in the same State. The mere fact that by virtue of his office he has access to investigation papers relating to the case should disqualify him from hearing the case.

The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

It is clear in this case that the original President Encik Abdul Murad was subsequently appointed Deputy Public Prosecutor in Negri Sembilan. It is therefore not in the interest of justice that he should continue to hear this case notwithstanding that he had already made an order to call for the defence. Justice must not only be done but also must be seen to be done.

It is noted from the records of this case that two orders of trial *de novo* were made, one following the other. These orders were made by different Presidents

on different dates, namely by Encik Mohd. Noor, the officer who succeeded Encik Abdul Murad, on 21st September, 1973, and Encik Wan Abdul Aziz, on 29th January, 1974.

Section 261 of the Criminal Procedure Code provides that whenever any magistrate after having heard and recorded the *whole* or *any part* of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding *may act* on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. The purpose of this section is to prevent a re-hearing in certain cases where a re-hearing will result in unnecessary hardship or injustice or unreasonable expenditure subject always to the guarantee as provided in proviso (a) that the accused may demand any witnesses to be re-summoned or re-heard.

The present case is a case in point having regard to the large number of witnesses already called and given evidence and the large number of exhibits already tendered. The difficulty in this case is only that a finding of guilt had already been made by the original President and he had also proceeded to record the evidence of the first defence witness; but this difficulty is not insurmountable. Section 325 of the Criminal Procedure Code allows the High Court in its discretion to exercise any of the powers conferred by section 316 of the Criminal Procedure Code. The order of the original President on the finding of guilt is in my view an "order" within the meaning of section 316(c). In the exercise of my revisionary powers I order that the trial of this case be continued under the provision of section 261 of the Criminal Procedure Code on the following terms. To enable that justice may be had the order of calling for the defence made on 20th September, 1972, is set aside; the record of evidence of first defence witness be expunged from the records, and the orders of "trial *de novo*" made on 21st September, 1973 and 29th January, 1974 are set aside.

Order accordingly.

SIVALINGAM v. PUBLIC PROSECUTOR

[O.Cr.J. (Hashim Yeop A. Sani J.) March 25, 1974]
[Seremban — Originating Motion No. 18 of 1974]

Criminal Law and Procedure — Trial — Application for reference of questions to Federal Court — Applicant unsuccessful on appeal — No question of public interest — Courts of Judicature Act, 1964.

In this case the applicant had been convicted for an offence under sections 408 and 477A of the Penal Code. His appeal to the High Court was dismissed. Subsequently he applied to have certain questions referred for determination by the Federal Court.

Held: the questions sought to be referred were not of public interest and therefore the application must be refused.

Case referred to:-

(1) *Tan Yin Yen* v. *Public Prosecutor* [1973] 2 M.L.J. 143.

ORIGINATING MOTION.

J. Nadchatiram for the applicant.

Abu Hashim bin Abu Bakar (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J. (delivering oral judgment): This is an application under section 66(1) of the Courts of Judicature Act, 1964, by the appellant in Seremban High Court Criminal Appeal No. 18 of 1972 that certain questions be referred for determination by the Federal Court. The applicant had earlier been convicted under sections 408 and 477A of the Penal Code by the learned President, Sessions Court, Port Dickson. He appealed against both conviction and sentence. At the hearing of the appeal on 16th February, 1974, the conviction and sentence were upheld.

The questions sought to be referred are as follows: —

(1) whether after the prosecution case is closed and during the course of a submission by defence counsel that the prosecution has not made out a case to answer under section 173(f) of the Criminal Procedure Code, the court may order further evidence to be produced?

(2) whether during the course of a submission of "no case" the court may direct the defence to call any witness?

(3) whether when a person is accused of an offence under section 408 of the Penal Code there is any onus or burden on him to explain how he dealt with the money he is alleged to have received?

At the commencement of hearing of the application counsel for the applicant has added the following question as an additional question also sought to be referred: —

(4) whether a criminal trial is a nullity if witnesses are called to give evidence before accused had done so in the light of section 173(j) of the Criminal Procedure Code?

In a proceeding of this nature the guideline for the High Court is given in the judgment of Federal Court in *Tan Yin Yen* v. *Public Prosecutor*[1] which appears in the last paragraph of the judgment as follows: —

"It is to be observed that questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under section 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court."

It is to be observed from the records of the appeal that questions (2), (3) and (4) were not grounds specifically referred to in the petition of appeal. Question (3) was referred to in the argument of the appeal only in the general context of the main submission that the conviction was against the weight of evidence.

With regard to questions (1) and (2) the position can be cleared by looking at the records of the appeal themselves. There was nothing on record that the learned President himself entertained doubt about the